[2019] UKFTT 604 (TC)

TC07387

PROCEDURE – Application for preliminary hearing – Scope of hearing – Which issues suitable for determination – Wrottesley v HMRC applied – Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05756

BETWEEN

THE BEST CONNECTION GROUP LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 20 September 2019

Akash Nawbatt QC, instructed by Peter Wilson Legal LLP, for the Appellant

David Yates QC and Barbara Belgrano, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Best Connection Group Limited has appealed against Determinations, under Regulation 80 of the Income Tax (PAYE) Regulations, issued by HM Revenue and Customs ("HMRC") in respect of two sets of payment arrangements it operated, namely BestPay Tax Relief ("BTR") and BestPay Salary Sacrifice ("BSS"), during 2012-13 to 2015-16 under which it deducted amounts in respect of expenses incurred by its employees for the purposes of computing tax and national insurance contributions to deduct for PAYE purposes.

2. It is common ground that the substantive hearing, which involves the position of many thousands of employees in the appellant's 80 branches and tens of thousands of documents, will be extremely lengthy lasting many weeks. Although the parties accept that the use of sampling would assist the Tribunal they have not been able to agree on a suitable method. Therefore, this case management hearing was listed to determine appropriate directions for sampling and other issues necessary for the progression of the case.

3. However, on 22 August 2019, HMRC made an application for there to be a preliminary hearing of a number of issues on the basis that these could be determined without sampling and may either determine the BTR appeal or at least significantly narrow the issues between the parties. This decision addresses that application.

4. In *Wrottesley v HMRC* [2015] UKUT 637 (TCC) at [28], having reviewed the authorities, the Upper Tribunal summarised the following "key principles" for consideration in determining whether a preliminary hearing should be ordered:

> "(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
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> (2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.
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> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
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> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.
>
> (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.
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> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
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> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial

preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly."

5. Although there is a level of agreement between the parties that preliminary hearing may be appropriate, this is dependent on the issues to be determined at such a hearing. Mr David Yates QC and Ms Barbara Belgrano, for HMRC, contend that for it to have any benefit a preliminary hearing should address all of the following issues:

(1) Is the appellant entitled to deduct amounts (that shall be treated for the purposes of the preliminary issue as amounts of expenditure that would fall within ss 337 – 339 ITEPA 2003) in determining the amount of PAYE income from which tax should be deducted? Alternatively were HMRC required to take into account the same when computing the amount of tax payable under the Regulation 80 determinations;

(2) Is the appellant is entitled to deduct amounts (that shall be treated for the purposes of the preliminary issue as amounts that would fall to be disregarded for the purposes of paragraph 3 of Part VIII of Schedule 3 to the Social Security (Contributions) Regulations 2001) for the purposes of computing what NIC to deduct for PAYE purposes;

(3) Where an employee on BTR did not earn sufficient taxable income in any tax year to use up all his personal allowance, does the Tribunal have jurisdiction to take his personal allowance into account in determining whether any additional tax or NI might otherwise be payable by or on behalf of such an employee;

(4) Should the Tribunal find that the BTR was not valid as a means of tax relief for allowable expenses incurred by the employee, when then deciding the quantum of additional tax or NI payable, does the Tribunal have jurisdiction to take account of the amount of tax or NI for which the employee would have been given relief had he made a claim at the end of the relevant tax year; and

(5) Did the appellant take reasonable care to comply with the PAYE Regulations and was there any failure to deduct was due to an error made in good faith? If the answer to the preceding question is "yes", should the Tribunal direct HMRC to make a direction under Regulation 72(5)? If the answer to the preceding question is "yes", what is the amount of the "excess" for the purposes of Regulation 72(5).

The above issue shall be determined on the assumption that the Appellants' auditing checks post October 2013 were reasonable (the Appellant accepts that no such checks were conducted before this time) and that such check revealed that some expenditure was incurred by the relevant employees albeit the Appellant elected to use benchmark scale rates regardless of the level of expenditure. This direction is without prejudice to HMRC's right to test the evidence on the adequacy of any audit checks at a subsequent hearing after the determination of the preliminary issues insofar as the appeals have not been disposed of"

6. Mr Akash Nawbatt QC, for the appellant, agrees that issues (1) to (4), above, are suitable for determination by way of a preliminary hearing but does not accept that is the case in relation to issue (5). Additionally, although it is stated above, in parenthesis, that "the appellant accepts no such checks were conducted", it is clear from the email of 12 September 2019 from its solicitors that the appellant does not make such a concession.

7. Applying the *Wrottesley* principles to the issues in this case (see paragraph 4, above) Mr Nawbatt says that issues (1) to (4) are questions of law and triable without significant delay;

that issues (1) and (2) are a "succinct, knockout point" which will dispose of the case or an aspect of the case; that issues (1) to (4) ae capable of being decided after a relatively short hearing without significant delay; that determination of these issues may result in there being no need for a further hearing and in any event are likely to substantially narrow the issues; and determination of these issues would significantly cut down the cost and time required for pre-trial preparation for the substantive hearing.

8. Mr Yates, however, contends that it is necessary to include issue (5). This is because even if HMRC succeed on issues (1) to (4), which address the effectiveness of the BTR scheme, the appellant also relies on Regulation 72 of the Income Tax (PAYE) Regulations 2003 under which it would have to establish that it took reasonable care to comply with the Regulations and that any failure to deduct was due to an error made in good faith. Although, unlike issues (1) to (4) which concern only questions of law, as Mr Yates accepts, issue (5) raises a question of mixed fact and law which will require evidence. However, he submits that unless issue (5) is included the Tribunal will not be able to conclusively determine the BTR appeal and a further hearing will be necessary.

9. This is accepted by Nr Nawbatt who says issue (5) could be determined at the substantive hearing of the appeal but that if it were to be included as a preliminary issue the time estimate for a hearing would need to be increased from a day or two to four or five days and, as the Upper Tribunal warned in *Wrottesley* (at [28(4)]), "the tribunal should be particularly cautious on matters of mixed fact and law".

10. With this very much in mind and having considered the guidance given by the Upper Tribunal in *Wrottesley*, I am of the view there should be a preliminary hearing in this case and that such a hearing should address all five issues including issue (5), notwithstanding it involves matters of mixed fact and law.

11. This is because, as Mr Nawbatt fairly accepted, with the inclusion of issue (5) there is a "succinct knockout point" that would dispose of an aspect of the case, the BTR appeal and that this can be decided after a relatively short hearing. On this point I note Mr Nawbatt's concern regarding the length of such a hearing but when this is considered in relation to the rest of of the case, which is likely to take many weeks, I think that its effect will be to reduce the potential for overall delay even if the possibility of an appeal on the preliminary issues is taken into account.

12. Also given that a decision on the preliminary issues will obviate or at least materially reduce the necessity for sampling it should have a significant bearing on the cost and time required for pre-trial preparation and, accordingly, would assist the Tribunal in dealing with the case fairly and justly, as required by Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2000, in particular by dealing with the case in ways which a proportionate to the importance of the case, the complexity of issues, the anticipated costs and resources of the parties and avoiding delay. There is also the possibility, as recognised by Mr Nawbatt but dismissed by Mr Yates, that the determination of these issues could result in a further hearing not being required or substantially narrow the issues between the parties which would aid any potential settlement.

13. Given that the appellant will be required to adduce evidence in relation to issue (5) it will be necessary to file witness statements and although these can stand as the evidence in chief of the witness concerned it is only after exchange of these witness statements can a time estimate for the preliminary hearing be made. I have therefore, in directions issued at the same time but separately from this decision, directed that the appellant files such witness statements following which the parties are to provide agreed dates for a hearing of the preliminary issues.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

14. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 26 SEPTEMBER 2019